STATE OF MICHIGAN

COURT OF APPEALS

44th CIRCUIT COURT, Respondent-Appellant,	UNPUBLISHED November 1, 2011
v	No. 299447 MERC
INGHAM COUNTY EMPLOYEES ASSOCIATION/PUBLIC EMPLOYEES REPRESENTATIVE ASSOCIATION, Petitioner-Appellee.	LC No. 09-000065

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

In this labor relations case, respondent 44th Circuit Court appeals as of right from the Michigan Employment Relationships Commission (MERC)'s decision concluding that the Friend of the Court and juvenile referees are covered by the Public Employment Relations Act (PERA), MCL 423.201 *et seq*. We vacate the MERC's decision and direction of election and remand for dismissal of petitioner's petition.

I. BACKGROUND

On June 24, 2009, petitioner filed a petition for a representation election in a unit of unrepresented Friend of the Court and juvenile court attorney referees employed by respondent. Respondent argued that the referees were not employees covered under PERA because they exercise judicial discretion that is "central to the administration of justice, bordering on a judicial role." Petitioner acknowledged that the MERC had previously held that Friend of the Court and juvenile referees were not covered under PERA, but argued that the MERC should reconsider those previous rulings in light of our Supreme Court's decision in *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291; 586 NW2d 894 (1998) and its subsequent rescission and replacement of Administrative Order (AO) 1997-6 with AO 1998-5.

The MERC opinion acknowledged its previous rulings that Friend of the Court and juvenile referees were not employees subject to PERA, referencing three such prior opinions: *State Judicial Council*, 1987 MERC Lab Op 924 (concluding that Friend of the Court referees were not subject to PERA because they had "judicial decision-making functions"); *St. Clair Co Probate Ct*, 1986 MERC Lab Op 350 (concluding that the juvenile referee functioned in a

"quasi-judicial capacity"); and *Monroe Co Probate Ct*, 1990 MERC Lab Op 880 (concluding that the juvenile referee had "quasi-judicial duties). Nevertheless, the MERC concluded that these cases were no longer binding in light of *Judicial Attorneys Ass'n* and AO 1998-5. Accordingly, the sole issue present in the MERC's decision is the legal question of whether the Supreme Court's 1998 opinion and administrative order changed the previously established law holding that referees were not employees subject to PERA.

II. STANDARD OF REVIEW

"Findings by the MERC with respect to questions of fact are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole." *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 175; 445 NW2d 98 (1989). However, regardless of the MERC's findings of fact, appellate courts are permitted to review the law. *Id.* "Judicial review includes the determination of whether a decision of the MERC is 'authorized by law,' Const 1963, art 6, § 28, and such a decision may be set aside on appeal if based on a 'substantial and material error of law.' MCL 24.306(1)(f)[.]" *Id.*

III. ANALYSIS

Prior to this case, rulings from the MERC had previously evolved to establish a settled rule that both Friend of the Court and juvenile referees were not subject to PERA because they had "judicial decision-making functions," functioned in a "quasi-judicial capacity," and has "quasi-judicial functions."

In *Houghton Co & Keweenaw Co Bd of Supervisors*, 1970 MERC Lab Op 652, the MERC concluded that "magistrates, as part of the judicial branch of government, are not subject to our jurisdiction." *Id.* at 653. Later that year, in *Monroe Co Bd of Supervisors*, 1970 MERC Lab Op 928, the MERC considered petitions related to all county employees, which included court employees. In a footnote, it limited the application of *Houghton*, holding that "the *Houghton* decision extended only to employees actually and directly exercising a judicial function." *Id.* at 933.

Sixteen years later, the MERC issued its determination that juvenile referees were not subject to PERA. In *St Clair Co Probate Court*, 1986 MERC Lab Op 350, the court, as employer, objected to the inclusion of the attorney-referee in the bargaining unit. *Id.* at 351. The MERC concluded that the attorney-referee was "not appropriately included in the bargaining unit" in part because "the Attorney-Referee functions in a quasi-judicial capacity." *Id.* at 354.

In *State Judicial Council*, 1987 MERC Lab Op 924, the MERC concluded that Friend of the Court referees should be excluded from PERA. The MERC noted that "the referees employed by the Third Judicial Circuit Court function more in a judicial manner than the magistrates, who are not lawyers and who are required only to be registered voters in the district." *Id.* at 928. The MERC ultimately concluded that

> it is the judicial decisionmaking function of the referees that indicated that the position should not be subject to PERA, an act administrated by the executive branch of government and thereby possibly restraining the power of the judicial

branch of government unnecessarily in its control over an employee exercising those judicial functions. [*Id.* at 929.]

Thus, prior to 1998, the status of the law was clear—juvenile and Friend of the Court referees were not subject to PERA. However, in the instant case, the MERC concluded that the Supreme Court's decision in *Judicial Attorneys Ass'n*, 459 Mich 291, along with the adoption of AO 1998-5, resulted in referees becoming employees subject to PERA, stating:

> In *Judicial Attorneys Ass'n v State of Michigan*, 459 Mich 291, 586 NW2d 894 (1998), the Michigan Supreme Court held that legislation making a local judicial council an employer of individuals working for the 3rd Circuit Court and dividing authority over those employees between Wayne County and the chief judge was unconstitutional as it impermissibly interfered with the Court's inherent authority to manage its operations. The Court wrote, at 299-300:
>
> > The judiciary is an independent department of the State, deriving none of its judicial powers from either of the other 2 departments. This is true although the legislature may create courts under provisions of the Constitution. The judicial powers are conferred by the Constitution and not by the act creating the court. The rule is well settled that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a co-ordinate branch of the government. It is only in such a manner that the independence of the judiciary can be preserved. The courts cannot be hampered or limited in the discharge of their functions by either of the other 2 branches of government. To remove bailiffs and other court personnel for cause is an inherent power of the judiciary. [*Gray v Clerk of Common Pleas Court*, 366 Mich. 588, 595; 115 N.W.2d 411 (1962).]
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> See also *Judges of the 74th Judicial Dist v Bay Co*, 385 Mich 710, 727; 190 NW2d 219 (1971), in which this Court found the authority of the district court to set the salaries of its employees to be "wholly consonant with the constitutionally prescribed functioning of the courts under inherent powers"; *Livingston Co v Livingston Circuit Judge*, 393 Mich 265; 225 NW2d 352 (1975), in which this Court relied on the inherent powers of the judiciary in holding that the circuit court was the employer of court personnel for purposes of salary negotiations; and *Ottawa Co Controller v Ottawa Probate Judge*, 156 Mich App 594; 401 NW2d 869 (1986), which affirmed the authority of the probate court to set the salaries of its employees as long as the court's total budget remains within the total budget appropriation set by the county board.
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> However, the Court also extended to the 3rd Circuit Court the terms of a 1997 Supreme Court administrative order establishing procedures to be followed by trial court chief judges in dealing with their local funding units over matters pertaining to the trial courts' employees, including collective bargaining. That

order was rescinded and replaced by Administrative Order No. 1998-5 which expressly provides:

> VIII. COLLECTIVE BARGAINING
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> For purposes of collective bargaining pursuant to 1947 PA 336, a chief judge or a designee of the chief judge shall bargain and sign all contracts with employees of the court. Notwithstanding the primary role of the chief judge concerning court personnel pursuant to MCR 8.110, to the extent that such action is consistent with the effective and efficient operation of the court, a chief judge of a trial court may designate a representative of a local funding unit or a local court management council to act on the court's behalf for purposes of collective bargaining pursuant to 1947 PA 336 only, and, as a member of a local court management council, may vote in the affirmative to designate a local court management council to act on the court's behalf for purposes of collective bargaining only.

Notwithstanding our earlier decisions withholding the right to bargain collectively from court employees with quasi judicial responsibility, Administrative Order 1998-5 contains no exceptions or exclusions applicable to any category of court employees. We are not empowered to impose limitations upon that which has been ordered by the Supreme Court. Consequently, we decline to follow the rulings of our previous decisions. [Thus] the Friend of the Court and juvenile referees are not excluded from the collective bargaining process authorized by Administrative Order No. 1998-5 . . . .

We hold that the MERC's legal reasoning is erroneous. In *Judicial Attorneys Ass'n*, the Supreme Court concluded that MCL 600.593a(3) through (10) was unconstitutional because it made the county and the judiciary co-employers of court employees, which was an unconstitutional violation of the separation of powers. 459 Mich at 295-296, 301-304. The opinion did not address whether court employees, let alone referees, were subject to PERA. Indeed, the opinion explicitly provides that it is making no decisions regarding PERA: "Because we have concluded that [the relevant statute subsections] are unconstitutional, *the issue of the rights of members of plaintiffs under the public employee relations act is moot.*" 459 Mich at 302 n 7.

The MERC's opinion appears to find *Judicial Attorneys Ass'n* applicable because the opinion extended AO 1997-6 to the Third Circuit Court, which order was then rescinded and replaced with AO 1998-5. *Id.* at 305-306 ("Therefore, under separate order today [AO 1998-5], we affirm and extend provisions of Administrative Order No. 1997-6 . . . ."). As previously noted, the MERC determined that the collective bargaining language contained in AO 1998-5 failed to specifically exclude referees and, therefore, necessarily included them, making them subject to PERA.

However, the MERC has ignored that the collective bargaining language on which it relied was already present, practically verbatim,[1] in AO 1997-6. Furthermore, the Court acknowledged that it was "affirm[ing] and extend[ing] current provisions of Administrative Order 1997-6 that [it] believe[d] w[ould] serve the present, immediate need for structuring more positive relations between chief judges and their funding units in the interest of promoting greater understanding, cooperation, and better service to the public." *Id.* at 306. Thus, the rescission and replacement of AO 1997-6 with AO 1998-5 seems to have no significance with respect to the collective bargaining provision.[2]

Furthermore, because many court employees were already subject to PERA, both AO 1997-6 and AO 1998-5 had to address the chief judges' role in collective bargaining. The mere reference to that role in the administrative orders does not indicate an intent by the Supreme Court to overrule or change the existing law regarding which court employees were subject to PERA. Given that referees had already been deemed not to be employees to whom PERA applied at the time the legislation was passed or the decision was issued, we fail to see how an administrative order designed to explain a trial court's duties related to currently existing PERA rights could be read as extending those rights to persons to whom PERA was deemed inapplicable. The MERC made a substantial and material error of law when it concluded otherwise. Accordingly, we vacate the MERC's decision and direction of election and remand for dismissal of petitioner's petition. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray

[1] The only difference is a change in citation in the first sentence, with AO 1997-6 citing "Public Act 336 of 1947," and AO 1998-5 citing "1947 PA 336."

[2] Indeed, the two orders are almost identical, except that 1998-5 added titles to the enumerated sections, and inserted "VI. Consistency with Funding Unit Personnel Policies," resulting in sections VI, VII, VIII and IX from 1997-6 being renumbered VII, VIII, IX and X in 1998-5.